

Scope of Analysis

I. Definition and Overview

- "Scope of analysis" is defined as the part of the project, its alternatives, and the direct, indirect and cumulative impacts the Corps will consider in evaluating a permit application. In general, it is the Corps' position that the geographic extent of this review authority and the level of analysis will vary with the amount of Federal control and responsibility over a project and the strength of the relationship between those impacts and the regulated portion of the activity.
- Does the need for a Corps Section 404 permit for a small part of a project justify an evaluation of the effects of the project as a whole?
- Scope of alternatives evaluated - based on project purpose:
 - * geographic scope of alternatives, as well as
 - * conceptual scope of alternatives
- Scope of evaluation of impacts caused by those alternatives:
 - * direct impacts
 - * indirect impacts
 - * cumulative impacts

II. Scope of Alternatives Evaluated

Alternatives that are practicable and feasible in light of the underlying purpose and need for the proposal, which on occasion are limited to the applicant's purpose and need. Corps intends to examine all reasonable alternatives, while not requiring costly and time-consuming evaluation of conjectural alternatives, the implementation of which would be more or less speculative.

III. Scope of Evaluation of Impacts by Those Alternatives

[From Corps NEPA regulations at 33 CFR Parts 230 and 325. Environmental

Quality; Procedures for Implementing the National Environmental Policy Act (NEPA) Final rule February 3, 1988.]

- The scope of analysis issues arise when the application for a Corps permit covers only a part of a larger project (e.g., the application for a Corps permit for a pier which is part of a larger, upland oil refinery project). In such a case, the Corps must determine the scope of analysis which will guide all of the Corps' enquiries under NEPA - such as: what portion of the total project will be covered in its EA describing the work, the range of environmental effects of that work, and alternatives to the proposed work.
- Based on the scope of analysis, the Corps decides whether the work would constitute a major Federal action significantly affecting the quality of the human environment.
- The scope of analysis the Corps will use for permit cases normally will cover the regulated activity (e.g., the pier) plus whatever other portions of the project the Corps determines to be within Federal control and responsibility.
- NEPA requires Federal agencies to consider the direct and indirect consequences of Federal actions, not State or private actions. When the Federal action is the issuance of a 404 permit, then the activity which would be authorized by the permit is the subject of the NEPA document.
- Although it specifies a broad range of impacts which must be considered, NEPA does not expand the authority of the Corps to either approve or disapprove activities outside waters of the U.S. In other words, construction of an upland facility may proceed without a Corps permit. The only activity legally dependent on the Corps action is the permitted activity.
- In certain circumstances, the scope of analysis should be expanded to include portions of the project outside Corps jurisdiction. The circumstances under which the scope should be expanded beyond the limit of jurisdiction involve those cases where the Corps has sufficient control and responsibility for the activities undertaken by the non-Federal party so that the environmental impacts are essentially a product of Federal action.
- The phrase "control and responsibility" is taken from judicial language but has proven difficult to articulate in regulations.
- In order to prevent the unwarranted situation where "the Federal tail wags

the non-Federal dog," the scope of analysis would be confined to the effects of only the activity requiring a permit.

- Until the Corps issued amendments to its regulations on February 3, 1988, the regulation addressing the scope of review was very broad. In January 1984 the Corps proposed regulations significantly restricting the scope of review implemented by the Corps. On February 25, 1985 EPA objected and referred the controversy to CEQ, which mediated the controversy for more than 2 years before siding with the Corps. This change was attributable to *Winnebago* and *Save the Bay*. Recently the Corps indicated it will use the same limits to the scope of analyses provided in their NEPA regulations and National Historic Preservation Act regulations, for their responsibilities under the ESA.
- Whatever portion of the project the Corps chooses to cover in the scope of analysis, the analysis will include all direct, indirect and cumulative impacts.
- Whatever scope of analysis is adopted by the Corps for NEPA purposes for evaluating impacts and alternatives must also serve as the scope of analysis for analyzing the expected benefits of a proposal [*Sierra Club v. Siegler* 695 F. 2d.957 (5th Cir., 1983)].

IV. Details in Corps Regulations Directing their Approach under NEPA and CWA Section 404 [Part 325 Processing of Department of Army Permits Appendix B (7)(b)(2)]

- Corps regulations do not define the point at which there is sufficient Federal control or responsibility over the entire project to "Federalize" it for NEPA purposes. This decision is entrusted to the district commanders, and is to be based on a reasonable evaluation of the case-specific factual situation.
- The DE is considered to have control and responsibility beyond the limits of Corps jurisdiction when the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of a larger project are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient control and responsibility exist include:
 - i) Whether or not the regulated activity comprises "merely a link" in a corridor-type project (transportation or utility transmission project);

- ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity;
- iii) The extent to which the entire project will be within Corps jurisdiction;
- iv) The extent of cumulative Federal control and responsibility. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation. In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the DE should consider whether other Federal agencies are required to take Federal action under FWCA, NHPA, ESA and other environmental laws and executive orders.

V. Implications for Scope of Consultation under Section 7 of the Endangered Species Act

A. Background

- ESA requires the Corps to consider the ESA effects of "any action authorized" (that is, any activity permitted) by the Corps.
- Corps action - power line crossing of the river - Corps confines review to the permit area surrounding the river crossing. Includes the jurisdictional reach of the Corps RHA authority and any uplands affected by the river crossing that are within a reasonable distance from the river.
- Linear projects - review limited to area relevant to Corps regulation under Section 10 or Section 404

B. Scope of Analysis - the Corps Perspective:

The Corps perspective was detailed in a letter to the Service dated November 27, 1991. The Director of Civil Works, U.S. Army Corps of Engineers, submitted a description of the Corps' planned scope of review for linear projects under Section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1543) for those activities relevant to Corps regulation under section 10 of the Rivers and Harbors Act of 1899 or section 404 of the Clean Water Act. Unfortunately, the Service elected not

to respond to the letter at that time, and we left this interpretation of the scope of analysis basically unchallenged.

1. **ESA effects that have a causal physical link to the activity authorized by the Corps.** The Corps makes a distinction between *de facto* legal control over a project which cannot be built "but for" a Corps permit; and its legal responsibility to consider indirect and cumulative physical effects of permitted actions. If considering a project where the Corps has "*de facto* or but for control" over a linear project, the Corps typically will confine its ESA review to the permit area. However, when the activity authorized has a physical effect outside the permit area, the Corps will look outside the permit area to evaluate those effects. The Corps does not believe that such "but for" control justifies the Corps broadening its jurisdiction to include indirect **non-physical** effects; such extensive regulation would overstep the limits of the Corps regulatory authority.
2. **Critical Habitat.** If FWS or an interested party informs the Corps that a linear project **will affect critical habitat outside permit area**; and through control over placement of a river crossing, the Corps can reasonably steer the applicant to this alternative practicable alternative, it may do so. However, the Corps is not acknowledging any additional legal obligation under the ESA; this is totally at the Corps discretion, and the Corps is not responsible for identifying presence or absence of protected species.
3. **As is the standard for the scope of analysis under NEPA and 404, the Corps may extend its scope of analysis to include the entire linear project**, if the project requires a significant number of permits that if granted would mean the Corps is essentially authorizing the entire project.
4. When none of these 3 situations are present, the ESA review will be confined to the permit area.
5. The Corps will assist the Service in prosecuting under Section 9.

C. Implications of the Corps 1991 Interpretation

Since 1991, the Corps has used the justifications stated in the November 27 letter to limit its scope of review not only for linear projects, but for a number of situations. The November 27 letter has been used by Corps districts as guidance to permit biologists when considering indirect impacts for permits issued under Section 10 or Section 404.

D. Another Perspective

- Under Section 7(a)(2) of the Act, all Federal agencies have the responsibility to ensure that their actions are not likely to jeopardize listed species or adversely modify critical habitat. In assessing the potential impact of an agency action, the direct and indirect effects of the action on listed species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action must be considered (50 CFR 402.02). Federal actions are defined as "all activities or programs of any kind authorized, funded or carried out....by Federal agencies" including "actions directly or indirectly causing modifications to the land, water or air" (50 CFR 402.02).
- As defined by 50 CFR 402.02, the action area to be assessed for potential impacts to listed species or critical habitat is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Further, the "effects of an action" are defined in 50 CFR 402.02 as "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action," where interrelated actions are those that are "part of a larger action and depend on the larger action for their justification", and interdependent actions are those that "have no independent utility apart from the action under consideration."
- The background information provided by 50 CFR Part 402 specifically states that " the "but for" test should be used to assess whether an activity is interrelated with or interdependent to the proposed action" (page 19932).
- Further, the Corps' procedures for implementing NEPA (33 CFR Parts 230 and 325) indicate that to "Federalize" an agency action, and thus make it subject to the provisions of Section 7 of the Act, "the district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action [33 CFR 325, Appendix B.7.b(2)]. One of the factors to be considered in determining whether sufficient "control and responsibility" exists includes "the extent of cumulative Federal control and responsibility" (33 CFR 325, Appendix B; Regulatory Guidance Letter 88-13).

E. Legal Cases Supporting the Extension of Corps' Responsibility to the Assessment of Off-site Impacts

1. *Colorado River Indian Tribes v. Marsh* [605 F. Supp. 1425 (D.C. Cal. 1985)]

The District Court considered and rejected the propositions that the Corps could limit consideration of the environmental effects of shoreline stabilization proposal to the direct effects of the rip-rap placement, and not consider for NEPA purposes the residential and commercial development to be built on the area thus stabilized.

The Court stated that: In limiting the scope of its inquiry, the Corps acted improperly and contrary to the mandates of NEPA. The Corps' decision to assess only those impacts physically dependent upon activities within its redefined jurisdiction, i.e., the river and its immediate banks, was tantamount to limiting its assessment to primary impacts (*Colorado Indian Tribes, supra* at 1432, 1433).

2. *Maryland Conservation Council Inc. v. Gilchrist* (4th Cir. 1986)

The court recognized that an entire project, e.g. construction of a highway, is federalized when a portion of that project must be approved by a federal agency. Further, construction of portions of the highway outside the area necessitating a Federal permit could not proceed without first complying with NEPA.

3. *National Wildlife Federation v. Coleman* [529 F.2d 359 (5th Cir. 1976)]

The court ruled that indirect effects of private development resulting from the proposed construction of highway interchanges had to be considered as impacts of a proposed Federal highway project, even though the private development had not been planned at the time the highway project was proposed.

4. Other cases supporting the Corps' extension of authority:

- *Thomas v. Peterson*, 753 F.2d 754, 758, 15 ELR 20225, 20226 (9th Cir. 1985)
- *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir., date unknown)

F. Summary

By stating that the Corps is responsible for assessing potential impacts, both direct and indirect, to listed species from a Section 404 or Section 10 permitting action, the Service does not mean to imply that the Corps has jurisdiction over activities conducted within the entire action area. In fact, the Service believes that the Corps has the sole responsibility to determine the project area over which it exerts jurisdiction. The Service only means that the Corps has the **responsibility**, as defined under Section 7 of the Act and the regulations implementing Section 7 of the Act, for **assessment** of potential impacts to listed species and critical habitat within the **action area**. The Service realizes that any reasonable and prudent measures or reasonable and prudent alternatives that may be included in the Service's biological opinion can only be for activities for which the Corps has and maintains jurisdiction.

Terms Common to Clean Water Act section 404 project review and National Environmental Policy Act Analyses, as used in Section 7 Consultation - from the Final Endangered Species Act Section 7 Consultation Handbook, March 1998.

Action - all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include....(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in--aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR 402.02]

Action area - all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. [50 CFR 402.02]

Effects of the action - the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. These effects are considered along with the environmental baseline and the predicted cumulative effects to determine the overall effects to the species for the purposes of preparing a biological opinion on the proposed action. [50 CFR 402.02] The environmental baseline covers past and present impacts of all Federal actions within the action area.

Indirect effects - those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur. [50 CFR 402.02]

Interdependent actions - actions having no independent utility apart from the proposed action. [50 CFR 402.02]

Interrelated actions - actions that are part of a larger action and depend on the larger action for their justification. [50 CFR 402.02]